STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
The Hon. Jane M. Beckering, Hon. Amy Ronayne Krause,
and Hon. Mark T. Boonstra

IN RE FILIBECK ESTATE,

Heidi J. Filibeck, Pers. Rep.
Plaintiff/Appellee,

-vs-

Laura Beal,
Defendant/Appellant.

Supreme Court No.:_____

Court of Appeals No.: 315107

Trial Court No.: 11-000065-CZ

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DEFENDANT-APPELLANT LAURA BEAL'S REPLY BRIEF

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REBUTTAL ARGUMENT

PLAINTIFF/APPELLEE FAILS TO FOLLOW RULES AND DOES NOT PRESENT TRUTHFUL AND FAIR ARGUMENT

Plaintiff-Appellee, in her Response to Defendant/Appellant's Request for Leave to Appeal, does not follow the Court Rules, continues to misunderstand, distort, and misapply the law, and makes both false and unsupported representations to the Court.

Several of the briefing requirements of MCR 7.212(C), including subsections (6) & (7) thereof, are made applicable to Application for Leave to Appeal proceedings in this Court. [MCR 7.302(A)(1)(d)&(e)] Both MCR 7.212(C)(6)&(7) require for all facts to be fairly stated and supported by "*specific page references to the transcript, the pleadings, or other document or paper filed with the trial court.*" Plaintiff/Appellee makes no such references to any of her claimed "facts", as stated on both pages 1 and 9 of her Response. While it is not believed to be overly significant as to how many people may have actually assisted Laura with the fundraiser, or what they may have specifically done in that regard, it is believed to be most important that the facts of the matter are truthfully and "fairly stated", as required by the applicable Court Rules. Although Plaintiff/Appellee has now toned down her claim made to the Court of Appeals, that Laura's helpers totaled in the "*dozens, perhaps hundreds*", to now just being "*numerous*", this Court should have the benefit of the actual evidence as presented during the trial, with citations to the record.

State Trooper Greg Cunningham, who investigated the Plaintiff's claim of embezzlement, testified that "*the fundraiser was put on by his* (Steve's) *family. And with a lot of support from also state police individuals*". He could only name Plaintiff Heidi Filibeck and Defendant Laura Beal, however, as the family members involved and, as to Heidi Filibeck, he testified "*I don't know of her direct involvement.*" (TT, p.27) Retired State Trooper Brian Smith testified that he donated "*a couple wildlife prints*", spent 1 or 2 days with another trooper collecting items from businesses,

helped "*clean up*" the flyer Laura Beal put together, and attended 1 or 2 meetings (at which 8-12 people were present). He also admitted "*I was not a key player in this. I think if you had to say who was in charge it would be Laura*". (TT, pgs. 41,43,50,53 & 54). Gary Sevon (also a State Trooper and Mr. Filibeck's best friend) and his wife Linda, testified they did not help out with the benefit, only learned of it through another trooper, donated a bench and a picture, only saw approximately 10-12 people at the benefit they considered as being volunteers, and neither felt cheated nor expected to get anything back. (TT, pgs. 62,63,75,76,78,80, & 90-93)

Finally, Suzan Kruhmin, Heidi Filibeck's sister, testified she was not involved with putting on the benefit, and attended no meetings, but she knew that many people were involved because she attended and saw "*all the kids and friends of Laura's and Lisa's. Just helping and bussing* (sic) *around doing this and that. And getting everything put together.*" (TT, pgs. 96,97,102 & 103) This was the extent of the testimony from which Plaintiff-Appellee has represented that there were "*dozens, perhaps hundreds*", and now "*numerous*" people involved. The true record facts are, of the 5 people who testified, 4 played no part, and the other said he "*was not a key player*".

While embellishing facts is bad enough, making them up is an altogether different, and much more serious, violation of the Court Rules and the Code of Professional Responsibility. This was done on page 9, where Plaintiff/Appellee states:

> All documents relating to the bank account in which the monies were deposited had been handed by Laura to Steve at the time the account was established. These items, consisting of the bank statement book, the bank signature cards, etc., continued to be in the possession of Steve at the time of the attempted gift. None of these indicia of ownership were, however, delivered by Steve to Laura or Lisa.

There is certainly a reason no reference to the record was made to support these claims, and the reason is that the record contains no such support. This same false claim was also made during oral argument to the Court of Appeals and is likely being made herein because it is being viewed, with the ruling which was there received, as having already paid dividends so why not try it again

The true and relevant facts, as supported in the Application and admitted in the Response, are that the monies were, with the full knowledge, consent, and approval of their father Stephen Filibeck, placed into a bank account titled solely in the name of Laura Beal, with her sister Lisa named as payable on death beneficiary of the account. Therefore, when Stephen made his death bed gift of these monies to his two daughters, by saying he wanted for them to have the monies to help pay for their educational expenses, Laura was in actual possession of the funds, Lisa had an expectancy interest in them, and the element of delivery was, by law, met.

The further "Statement of Fact" claim, made in paragraph #3, page 1 of the Response, that:

> Heidi Filibeck would not personally be the primary beneficiary of the Estate, but instead she, as the spouse of the decedent, would share the estate with the Decedent's children, Defendant/Appellant and her sister, Lisa

is neither factually nor legally correct. Legally, Heidi Filibeck would have received the first $100,000.00 (properly adjusted), plus ½ of any excess; Laura and Lisa would have each received 25% of the remaining excess. [*MCL 700.2102(1)(f) & (2)*] This clearly makes Heidi the "*primary beneficiary*" of Stephen's Estate. Factually, the Estate was long ago fully distributed by Heidi to herself; Laura and Lisa have not received a single cent from their father's Estate.[1]

Plaintiff/Appellee argues, without citation to any supporting legal authority, that Defendant/Appellant waived her right to rely upon the clear and longstanding case law of this State [holding that the delivery element of a gift is satisfied when the donee (or someone on behalf of the donee) is already in possession of the item gifted], because she did not cite or argue this law in the lower courts. Plaintiff/Appellee fails to understand there was neither need nor requirement for the

[1] Heidi actually deeded herself Stephen's home (his single largest asset) contrary to how he had expressed to her and others he wanted for the home to be handled upon his death (which contrary expression Heidi admits, but claims to not be obligated to follow); and she also received the total $83,000.00 of Stephen's employer provided life insurance death benefits (as a default beneficiary), notwithstanding that Stephen had named his two daughters as his intended beneficiaries under that policy. Although Defendant/Appellant attempted to have these two matters also litigated in this same benefit money lawsuit, Heidi objected and the trial judge refused to allow for that to happen, thereby necessitating the bringing of a separate lawsuit in another court, which other lawsuit is presently still pending.

In the often cited case of *White v. Sadler, 350 Mich. 511, 525, 87 N.W.2d 192 (1957)*, our Supreme Court at that time said:

> It is not good for the legal profession to have litigants proclaiming that lawyers have neglected their cases. And it most certainly is not good for the litigants if their claims should happen to be true — **and worse yet when nobody turns a hand**. Whether a given claim of neglect by an attorney is groundless or not, **it should never be ignored**, whatever may properly happen to the main case. **There is a responsibility resting squarely on our courts to investigate such charges as and when they are made. Attorneys are officers of the court and should be amenable to rapid answer to our courts when their actions are brought in serious question**. (Emphasis supplied.)

In *Hammond v. Weiss, 46 Mich. App. 717, 721, 208 N.W.2d 578 (1973)*, it was further said:

> Once an attorney accepts a retainer to represent a client, he is **obligated to exert his best efforts wholeheartedly to advance his client's legitimate interest with fidelity and diligence** until he is relieved of that obligation either by his client or by a court. *State Bar of Michigan v. Daggs, 384 Mich. 729 (1971).*
>
> **There should be no reluctance to recognize the validity of a claim for legal malpractice**. Indeed, whatever may properly be the result of a private claim of legal malpractice, **there is a responsibility resting squarely upon the courts to investigate such charges as and when they are made**. (Citing to *White v. Sadler,* supra.) (Emphasis supplied.)

While these cases involved different facts and issues than the present case, the expressed concern of those Courts about upholding the integrity of the profession, and properly dealing with the wrongdoing of its officers, is very much applicable to this matter. Unfortunately, the lower courts in this matter have not only failed to address the wrongdoing, they have rewarded it by their rulings.

Plaintiff/Appellee, also without citation to any supporting legal authority, further argues that valid delivery of a gift can never exist if some "indicia of ownership" remains with the donor. The actual case law has, however, for more than a century, been quite to the contrary. In *Shepard v. Shepard, 164 Mich. 183, 200-201, (1910)* it was said:

> This proposition seems to be well supported by authority, that **no absolute rule can be laid down as to what will constitute a sufficient delivery to support a gift in all cases**, for in each case the character of the **delivery** requisite to sustain the

that a child who is the subject of a paternity proceeding has no father during the time prior to the entry of the paternity order, because the established father can only be the father from the time of the order forward. Consequently, anything that may have been done, and any rights or obligations that may have come into existence, between the father and his child, prior to the entry of the paternity order, would all have to be null and void because the court establishment of fatherhood only applies prospectively. The absurdity of such an argument is clear and it speaks for itself.

The law of constructive trusts recognizes the legal ownership interest of the "true" owner of property *ab initio*; it is not used to create gaps for when there is no owner, as is now being argued. And, whatever ownership rights the "true" owner may have exercised over his property, prior to the judicial recognition of his legal rights, should be upheld by the court rather than be ignored or invalidated. After all, a major function of the court is to do justice by making certain that a property owner's intentions are recognized and carried out, not thwarted and set aside. It simply makes no sense to say, as the lower courts in this matter have said, that Stephen owned the monies and could control some of their use, but not all of their use. He is either an owner with full rights or he is not.

If some members of the bench and bar have such a warped understanding of the law of constructive trusts (which law Plaintiff/Appellee admits is significant to this State's jurisprudence), then that alone should be sufficient enough to establish the need for this Court to address the issue and enlighten the misinformed, before this once settled area of the law becomes even more unsettled than this case has already made it. To not do so now will only cause for greater injustices, and more inequitable results, to later occur. The citizens of this State need to be secure in their knowledge that the officers of their courts, and those who administer their justice system, know, understand, and follow the law; nothing should be more significant to the jurisprudence of this State than that.

COURT OF APPEALS RULING IS CLEARLY ERRONEOUS AND IT BOTH CONFLICTS WITH THE PRIOR RULINGS OF THIS COURT AND THE COURT OF APPEALS AND IT CAUSES MATERIAL INJUSTICE TO STEPHEN FILIBECK AND HIS TWO DAUGHTERS

The trial court ruled, and the Court of Appeals affirmed, that an expectancy interest in personal property cannot be gifted. This is directly and clearly contrary to MCL 554.35 (which statute was not even addressed by the Court of Appeals, nor has it been addressed by the Plaintiff/Appellee). The current Court of Appeals ruling also runs contrary to many prior Court of Appeals decisions involving this statute. [Eg. - *Zgieb v. Wells, 271363 (unpublished Mich. App. 10-18-2007); Wengel v. Wengel, 270 Mich. App. 86, 714 N.W.2d 371 (2006); Albro v. Allen, 170 Mich. App. 238, 428 N.W.2d 34 (1988); In re Edgar Estate, 137 Mich. App. 419, 357 N.W.2d 867 (1984); Detroit Bank and Trust Company v. Grout, 95 Mich. App. 253, 289 N.W.2d 898 (1980)*]

The Court of Appeals further ruled that there was no delivery of the gifted monies, actual or constructive, notwithstanding they were in an account in the name of the donee, and at the direction of the donor, at the time of the gift. This ruling also runs directly and clearly contrary to the prior rulings of both this Court and the Court of Appeals. [*Burt v. Bank of Saginaw, 241 Mich. 216, 223, 217 N.W. 71 (1928); Davidson v. Bugbee, 227 Mich. App. 264, 268, 575 N.W.2d 574 (1997).*

It is hard to understand how Plaintiff/Appellee can state that the issues in this case are all of major significance to the jurisprudence of this State, but have already been addressed in prior case decisions, which this case followed, without presenting any of that prior case law. While there most certainly is controlling prior law, as has been set forth by Defendant/Appellant, unfortunately that law has not been followed in this matter, and that is why this Court needs to now involve itself.

Dated: 8/8/14

Gerald Mason, Atty. for Defendant/Appellant

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element of delivery to be argued before now because it was not an issue in the case until the Court of Appeals made it one in its ruling; the ruling for which Leave to Appeal is now being sought.

Plaintiff/Appellee, again without citation to any supporting legal authority, also argues that even if the element of delivery is met because of the money being in Laura's possession at the time of the gift, it would only have been met as to half of the money, as the other half was given to Stephen's other daughter Lisa, who was not herself in possession of it, and therefore no delivery was made to her. The applicable law, however, is actually contrary to this unsupported argument.

One of the leading gift cases in Michigan is *Osius v. Dingell, 375 Mich. 605, 611, 134 N.W.2d 657 (1965)* wherein the Michigan Supreme Court said:

> As to delivery, it must be unconditional and it may be either actual or constructive; **the property may be given to the donee or to someone for him**. (Citation omitted.) (Emphasis supplied.)

[See also *Jones v. Causey, 45 Mich. App. 271, 274, 206 N.W.2d 534 (1973)*; *In re Herbert's Estate, 311 Mich. 608, 613, 19 N.W.2d 115 (1945)*; *Ford v. Ford, 270 Mich. 487, 491, 259 N.W. 138 (1935)*; and *Clough v. First Nat. Bk. of Paw Paw, 254 Mich. 298, 301, 236 N.W. 790 (1931)*]

This constructive delivery has been the law in Michigan for well over a century. [*Chaddock v. Chaddock, 134 Mich. 48, 50 (1903)*] Therefore, Stephen's gift of the monies held in Laura's name, to be used by both of his daughters to help pay for their educational expenses, was properly delivered to Laura for her own benefit, as well as for the benefit of her sister Lisa, the co-donee.

Although Plaintiff/Appellee cites to the *Osius* case in her Response, she ignores that part of the decision allowing for delivery of a gift to be made to another for the benefit of the actual donee. This is not all that surprising, as Plaintiff/Appellee also totally misapplies that case to the matter now before the Court. The *Osius* Court was actually called upon to decide whether certain property had been made the subject of a gift *inter vivos* or the corpus of a trust; and ruled it was trust corpus.

Plaintiff/Appellee wrongly ascribes the *Osius* ruling, that an *inter vivos* (lifetime) gift must be unconditional, to also being a requirement for a *causa mortis* (in contemplation of death) gift,

which by its very nature and definition is a conditional gift; the condition being that the donor in fact dies. [*Brooks v. Gillow, 352 Mich. 189, 89 N.W.2d 457 (1958)*; *Lumberg v. Commonwealth Bank, 295 Mich. 566, 295 N.W. 266 (1940)*] The unconditional requirement of a gift, as it was addressed in *Osius*, and is now being argued by Plaintiff-Appellee, applies only to *inter vivos* gifts. The *Osius* court actually cited to the *Lumberg* decision when it stated: "*This means that a* ***gift inter vivos must be fully consummated during the lifetime of the donor*** *and must invest ownership in the donee beyond the power of recall by the donor.*" (Emphasis supplied.)

Although Plaintiff/Appellee made this same erroneous argument in the Court of Appeals, and Defendant/Appellant pointed out the incorrectness of it in that Court, she nonetheless continues to incorrectly argue in this Court that Stephen's *causa mortis* gift, (which was found to have been made by both the trial court and the Court of Appeals, but was improperly invalidated for other reasons, i.e. - no ownership and no delivery), is invalid simply because Laura had correctly understood that, should her father have "miraculously" survived, the gift would then have been subject to recall by her father. Plaintiff/Appellee is apparently of the mindset that because the misrepresentation has worked in her favor once already she should just keep on making it.

This presents the highly unusual and most perplexing situation where an officer of the court (who is supposed to know and properly apply the law, but does neither), is actually arguing to the Court that the layperson's correct understanding and application of the law is what the Court should rely upon in ruling against that lay person. Having to respond to such nonsensical positions, proffered by an officer of the court, is extremely frustrating and most embarrassing; and it is made much worse by having to be done over and over again. This improper conduct (which is not an isolated incident in this matter) should alone be reason enough for this Court to involve itself with the matter – the dignity of the profession as a whole would seem to require it.

transaction as a gift **will depend very largely upon the nature of the subject-matter of the gift, and the situation and circumstances of the parties**.

...

The question as to what change of possession is required to support a gift is often necessarily a relative one. The mere open and visible change of possession is obviously not possible in all cases.

...

In the application of this rule, it is well settled that if there has been an actual or constructive delivery of the subject-matter of the gifts, with the intent to vest title, **the fact that the donor retains possession of the same for any purpose is not sufficient to defeat the gift; nor is the gift defeated by the fact that the donor reserved to himself the use or income from the subject-matter of the gift**. (Emphasis supplied.)

[See also *In re Herbert's Estate*, supra – The act of delivery is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him, but it is the act of the grantor, indicated either by acts or words or both, which shows an intention on his part to perfect the transaction, by surrender of the instrument to the grantee, or to some third person for his use and benefit. (p. 613); and *Ford v. Ford*, supra – if there has been an actual or constructive delivery of the subject-matter of the gifts, with the intent to vest title, the fact that the donor retains possession of the same for any purpose is not sufficient to defeat the gift. (p. 492)]

CASE PRESENTS ISSUES OF MAJOR SIGNIFICANCE TO STATE'S JURISPRUDENCE

Fundraisers are likely held almost every day in this State, to raise monies for one cause or another. Who legally owns those raised monies, however, has never been addressed by an appellate court in this State, or apparently any other state for that matter. The only reported similar cases which could be found were *Babcock v. Fisk, 327 Mich. 72, 41 N.W.2d 479 (1950)* and *In the Matter of Maribel Gonzalez, deceased, 262 N.J. Super. 456, 621 A.2d 94 (1992)*, each of which dealt with general newspaper solicitations for donations to be made to established trust accounts at local banks; neither dealt with a local fundraiser held by one family member to benefit another, with the monies raised held in an account in the name of the fundraiser, at the direction of the intended beneficiary.

In *Babcock*, the court ruled that the donated monies belonged to the minor for whose benefit they had been donated, but were to remain in trust until she reached the age of majority, when they were to be paid over to her. The *Gonzales* court, on the other hand, ruled that the donated monies

belonged to the donators and, when the purpose for which they were donated ceased to exist, should be returned to them. The Defendant/Appellant in this case argued that, under either of these rulings, the excess funds raised, but not needed to pay medical bills, should belong to she and her sister; under *Gonzales* because they were the ones who raised and "donated" them, and under *Babcock* because they were the donees of the gift from their father for whose benefit they had been raised.

Plaintiff/Appellee has taken this argument and twisted it to be Laura Beal claiming that she raised these monies for herself. Nothing could be further from the truth. Laura has at all times maintained they were raised for her father's chemotherapy treatments and, when not needed for that purpose, were then used in accordance with the expressed directions of her father. This included paying off his mortgage, as well as a gift he made to both she and her sister, to help offset their educational expenses. Plaintiff/Appellee takes no issue with Stephen paying off his home mortgage (from which she benefitted), but only complains of his gift made to his two daughters. Laura has always acknowledged that these monies were raised by her to be used for her father's benefit, and according to his direction; which is exactly what she did with them. Heidi is actually the one who does not want for Stephen to be able to control what happens to this money, not Laura as she argues. Heidi wants for the money to belong to Stephen, but only if that means she will ultimately receive it.

Neither the trial court nor the Court of Appeals has clearly and intelligently addressed who the legal owner of these raised monies actually is. Plaintiff/Appellee now argues, again without citation to any legal authority, that these monies had no legal owner until the trial court ordered for a "constructive" trust to be established for Stephen. And because the order applies prospectively, and Stephen was deceased when it was entered, the monies had to go into his estate; notwithstanding he had exercised the control of an owner over the funds prior to his death and gifted them away.

Frankly, this argument makes no sense and is also itself a clear indication as to why this Court now needs to become involved with this matter. To make such an argument is akin to saying